

THE HIV STIGMA: DUTY OR DEFENCE?

*Kate Harker and Ellen Wright**

Abstract: This article will outline and analyse the current stance of English criminal law regarding the transmission of HIV. The issues that surround consent, particularly in circumstances involving HIV, will be examined in conjunction with the defence of ‘reasonable precautions’ with a particular focus on condom use and antiretroviral therapy. Attention will be paid to the contribution of case law and the various circumstances which may fall within this realm in order to gain insight into the social and personal difficulties that the virus presents both infected and uninfected parties. The paternalistic nature of the current legal approach to HIV sufferers will be critiqued and finger-pointing at vulnerable infected parties will be analysed, with a view to exploring alternative possibilities which value dignity and equality over self-preservation.

A. INTRODUCTION

In English law, criminal prosecution is possible when an individual transmits HIV to another person through unprotected sexual intercourse. Cases deemed appropriate for prosecution will likely proceed under s 20 of the Offences Against the Person Act 1861,¹ upon the presumption that the defendant has recklessly transmitted the virus to an unsuspecting victim. However, if the victim has consented to sexual intercourse, with full knowledge of the defendant’s HIV status, the defendant will be afforded the defence of consent and his² liability will be negated. At present, informed consent offers the only known defence to the sexual transmission of HIV, which places a heavy burden on carriers of the virus to disclose their status before engaging in intercourse. This paper argues that the duty to forewarn others is unnecessarily harsh, as it forces HIV sufferers either to abstain from sexual activity or to disclose their status to all potential partners. Consent to the risk of transmission should not be the only defence available. A defendant should not be answerable where he has taken reasonable precautions to reduce the risk of transmission, through the proper use of condoms, or where he has a low or undetectable viral load.

* Kate Harker and Ellen Wright both obtained Masters Degrees in Law from Teesside University in 2014. We would like to thank Sarah Fuhrman for her constructive advice and invaluable assistance through the editing process, and everyone in the wider publishing team that has given their time to this article. Credit is also due to the staff of Teesside University’s law department who have instilled within us a fervent passion for legal discussion.

¹ The Offences Against the Person Act 1861(Offences Against the Person Act) s 20. A prosecution under s 18 is also possible for the intentional infliction of grievous bodily harm (GBH). However, the burden of proof for this crime is extremely high, so prosecutors are unlikely to rely on this section.

² To avoid confusion, the authors will refer to the defendant as male and to the victim as female. Their arguments, however, apply equally to all genders and combinations of sexual partners.

It seems inevitable that at some point a defendant will raise the issues of condom use and viral load. Nevertheless, until this happens, the common law cannot develop, and HIV carriers are left with great uncertainty. Rather than waiting for the courts to formulate additional defences to the criminal transmission of HIV, a statutory defence of reasonable precautions should be created that erases any doubts that the courts or HIV sufferers may have.³ Though a defence is preferable, the use of reasonable precautions to negate the defendant's recklessness will also be discussed. This is a real reform possibility; in fact, a recent scoping paper by the Law Commission examines the legal effect of precautionary measures on a defendant's recklessness.⁴

This article will begin with an overview of the current state of the law. The development of the consent defence will be outlined, and attempts to redefine the parameters of the defence will be discussed. The article will then turn to the proposed solution to the problem: a defence of reasonable precautions that would absolve the defendant of liability for non-disclosure where they had taken precautionary measures to substantially lower the risk to the victim. The use of precautionary measures to negate the defendant's recklessness will also be discussed.

B. CRIMINALISING NON-DISCLOSURE

At present, HIV sufferers are in a state of limbo, as the courts have not yet specified when a sufferer must disclose their status to a sexual partner before engaging in intercourse.⁵ The contested cases that have arisen so far have not touched upon all of the issues that could bear on a defendant's liability. *R v Dica*⁶ and *R v Konzani*⁷ both involved defendants who had engaged in high-risk sexual activity⁸ and, perhaps more importantly, who did not question the allegation that they had acted recklessly in doing so.⁹ Understandably then, there was no discussion in either case of the nature of the risk taken or how reasonable that risk was.

³ A reasonable precautions defence has been discussed by others, although not in the same ways: David Hughes, 'Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV' (2013) 77 *Journal of Criminal Law* 136; KJM Smith, 'Sexual Etiquette, Public Interest and the Criminal Law' (1991) 42 *Northern Ireland Legal Quarterly* 309, 328.

⁴ See Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Law Com CP No 217, 2014), 6.25-6.30.

⁵ Note that a person cannot be liable in English law for merely exposing someone to the risk of infection with HIV. Therefore, any reference to liability for non-disclosure means only those cases where there has been actual transmission.

⁶ [2004] EWCA Crim 1103, [2004] All ER 45.

⁷ [2005] EWCA Crim 706, [2005] 2 Cr. App. R. 14.

⁸ ie unprotected penetrative sexual intercourse. *Dica* (n 6) 11; *Konzani* (n 7) 3-4.

⁹ *Dica* (n 6) 11; *Konzani* (n 7) 3-4.

Consent by a sexual partner to run the risk of infection with HIV provides a defence, but in almost all circumstances, it appears that this requires disclosure by the HIV positive person of his status. Placing the duty to disclose on the defendant ignores situations where the victim might have learned of the risk of HIV transmission from a source other than the defendant, and ignores the risk inherent in certain relationships. The issues surrounding the defence of consent will be considered before the discussion turns to the idea of reasonable precautions as a defence to the transmission of HIV.

1. Consent in the courts: the doctrine as it relates to the transmission of HIV

Consent by a sexual partner to the risk of infection with HIV provides a defence to a charge of recklessly transmitting the virus. The issue first arose in *Dica*. In that case, the defendant had unprotected sexual intercourse with two different women who were subsequently diagnosed as being HIV positive.¹⁰ At first instance, the trial judge ruled that the jury could convict the defendant even if he was able to show that the complainants were aware of his condition.¹¹ Judge Philpot considered himself bound by the decision of the House of Lords in *R v Brown*, which found that consent is not a defence to the infliction of actual bodily harm unless the case falls within one of the recognised exceptions.¹² Given that it was not possible to bring HIV transmission within any of those exceptions, Judge Philpot held that it was not possible, as a matter of law, to consent to the risk of infection with HIV.¹³

The Court of Appeal disagreed, recognising a fundamental difference between a deliberate harming and the deliberate taking of risks that result in harm.¹⁴ The Court was clearly intent on highlighting the different motivations of the defendants in *Brown* and in *Dica*. In *Brown*, the parties indulged in serious violence solely for sexual gratification.¹⁵ In *Dica*, the parties were not intent on any kind of self-harm through sexual intercourse, but were ‘simply prepared, knowingly, to run the risk – not the certainty – of infection, as well as all the other risks inherent in and possible consequences of sexual intercourse, such as, and despite the most careful precautions, an unintended pregnancy’.¹⁶ In other words, the Court understood that such risks have always existed and that to criminalise HIV transmission

¹⁰ *Dica* (n 6) 3-8.

¹¹ *ibid* 13.

¹² See [1994] 1 AC 212 (HL), 231, 235, 245, 246.

¹³ *Dica* (n 6) 13.

¹⁴ As summarised by Matthew Weait, ‘Criminal Law and the Sexual Transmission of HIV: *R v Dica*’ (2005) 68 *Modern Law Review* 121 at 124.

¹⁵ *Brown* (n 12) 231.

¹⁶ *Dica* (n 6) 47 (Judge LJ).

would ‘mark it out for special treatment’.¹⁷ The Court of Appeal therefore decided that, whilst consent would not be available to intentional transmissions of the virus, it *would* be available to reckless transmissions, where there was consent to that risk from the defendant’s partner.

However, the Court firmly stated that consent to sexual intercourse was not consent to the risk of sexually transmitted diseases.¹⁸ Thus, the Court suggested that there could be a successful prosecution where a person, knowing that he was suffering from HIV (or some other serious sexual disease), recklessly transmitted the virus to a sexual partner from whom the risk was ‘concealed’ and not consented to.¹⁹ Consequently, the suggestion in *Dica* was that the deliberate failure to disclose one’s status prior to intercourse would negate the possibility of legitimate and transformative consent.²⁰

In *Konzani*, first heard just ten days after the Court of Appeal’s judgment in *Dica*, it was confirmed that the touchstone of consent is conscious and willing consent to the risk of becoming infected with HIV.²¹ However, where the Court in *Dica* talked of the risk of infection with HIV as one of a number of risks involved in sexual intercourse,²² the Court in *Konzani* appeared keen to elevate this risk above other less probable or serious risks associated with intercourse. Judge LJ stressed that: ‘[t]here is a critical distinction between taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease’.²³ The Court thus established that for the defence to apply, the defendant must make full disclosure of his status to the complainant, who must consent not only to the sexual activity but also to the risk of transmission of HIV.²⁴

This review of the case authority reveals the duty of disclosure placed on sufferers of the disease. It is an affirmative duty to disclose one’s status in all circumstances, regardless of what the victim might know about the defendant, and regardless of the type of relationship between the parties. As will be shown, this is too restrictive a reading of consent.

¹⁷ Vanessa E Munro, ‘On Responsible Relationships and Irresponsible Sex – Criminalising the Reckless Transmission of HIV: *R v Dica* and *R v Konzani*’ (2007) 19 Child and Family Law Quarterly 112, 114.

¹⁸ *Dica* (n 6) 59 (Judge LJ).

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *Konzani* (n 7) 41-42.

²² The Court also discussed other sexually communicable infections, such as syphilis. See *Dica* (n 6) 2.

²³ *Konzani* (n 7) 41.

²⁴ *ibid.*

2. *The defendant as discloser*

Konzani has been noted for the emphasis it places on the behaviour of the defendant.²⁵ The victim's knowledge is assessed indirectly, through an examination of the defendant's non-disclosure, rather than by considering what the victim actually knew about the defendant's condition.²⁶ This overlooks the other ways in which the victim may have learned of the defendant's illness. It assumes that the only way for the victim to gain knowledge of their partner's illness is from their partner, when this is but one of a number of possible sources. For example, one of the defendant's family members may have told the victim about the defendant's condition. Is the defendant unable to avail himself of the defence of consent in those circumstances? Similarly, what if the complainant knows that one of the defendant's previous long-term sexual partners is HIV positive? Has the victim not accepted and consented, albeit implicitly, to the risk of infection with HIV? Surely, Weait is right that:

where a person consents to sexual intercourse with knowledge of these facts, and becomes infected, the defence should be available because in each of these cases that person [is] aware of the risk of transmission. They may be ignorant of a partner's HIV positive status in the sense that this has not been disclosed to them by him, but to deny the defence if there is in fact knowledge of the risk, and a willingness to accept it, would be tantamount to saying that the person infected bears no responsibility for their own sexual and physical health.²⁷

The courts seem to struggle with this idea. In *Konzani*, Judge LJ accepted that an honest belief in consent without disclosure could provide a defence, but then noted that '[s]ilence in these circumstances [where an individual knows they are infected and does not make their partner aware of this] is incongruous with honesty, or with a genuine belief that there is an informed consent'.²⁸ He concluded that in most cases it would be 'wholly artificial' to assert an honest belief in consent in the absence of disclosure.²⁹ This is reinforced by the Court's discussion of the limited circumstances in which informed consent (or an honest belief in it) would be possible without the defendant's disclosure:

By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent, if it were indeed informed, would remain a

²⁵ Munro (n 17) 117.

²⁶ *ibid.*

²⁷ Matthew Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*' (2005) 68 *Modern Law Review* 121, 128.

²⁸ *Konzani* (n 7) 44, 42.

²⁹ *ibid.* 42.

defence, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. Even if she did not in fact consent, this example would illustrate the basis for an argument that he honestly believed in her informed consent. Alternatively, he may honestly believe that his new sexual partner was told of his condition by someone known to them both.³⁰

Thus, the courts largely preclude the possibility of informed consent without disclosure.³¹ Moreover, they suggest that even where a person understands that a non-disclosing sexual partner may be HIV positive (eg because of his prior history of intravenous drug use), such understanding will not provide the defendant with a defence.³² From this reading of the case law, it appears that the courts have not recognised the questionable nature of criminalising those who transmit the disease, where the uninfected party is, even without disclosure, well aware of the risk she is exposing herself to.

3. *Treating relationships equally*

As explained above, the doctrine of consent is strictly applied in criminal transmission cases. Not only must the defendant disclose their condition to the victim, regardless of the victim's knowledge, but the defendant must also discharge this duty regardless of their relationship with the victim. Some have suggested that the nature of the relationship bears on what the uninfected partner can be deemed to have consented to.³³ Spencer suggests that the risk of contracting sexually transmissible diseases is something that 'comes with the territory' when a person engages in 'casual or commercial sex'.³⁴ In other words, the risk should be deemed to have been consented to simply by virtue of consenting to sex. He sees a difference in the type of consent required, however, where the relationship is affectionate and lasting.³⁵ Then, it is increasingly unlikely that the uninfected partner suspects a heightened risk of infection. The Court of Appeal in *Dica* acknowledged Spencer's commentary, and in doing so, highlighted the extreme differences that can exist in the relationships between parties.³⁶ Judge LJ drew particular attention to the fact that:

At one extreme there is casual sex between complete strangers, sometimes protected, sometimes not, when the attendant risks are known to be higher, and at the other,

³⁰ *ibid* 44 (Judge LJ).

³¹ See Matthew Weait, 'Knowledge, Autonomy and Consent: *R v Konzani*' (2005) *Criminal Law Review* 763, 767. He has rightly observed that, in both of the hypotheticals that the Court gives, there has, in effect, been disclosure anyway, albeit through context or through a third party.

³² *ibid* 768.

³³ JR Spencer, 'Liability for Reckless Infection – Part 2' (2004) 154 *New Law Journal* 448.

³⁴ *ibid*.

³⁵ *ibid*.

³⁶ *Dica* (n 6) 15, 47-50.

there is sexual intercourse between couples in a long-term and loving, and trusting relationship, which may from time to time also carry risks.³⁷

The Court went on to highlight two very different instances where a committed relationship might still carry a risk of harm: First, a Roman Catholic couple who are unable to use artificial contraception on religious grounds, despite the fact that one of them is infected with HIV; second, a young couple, desperate for a family, who know that pregnancy will threaten the woman's life.³⁸ What these hypotheticals mean for defendants in criminal transmission cases has been much debated. Weait argues that the Court concluded that the type of relationship between partners is immaterial because there is a 'ubiquity of risk-taking by couples'.³⁹ Munro questions this.⁴⁰ She contends that the Court simply believes that participants in casual sexual relationships should be deemed to have consented to those risks along with intercourse.⁴¹ In her opinion,⁴² this fits better with Judge LJ's statement that, 'given the long-term nature of the relationships, if the defendant concealed the truth about his condition from them, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it'.⁴³ Such a reading would suggest that the Court is open to a distinction in the type of disclosure necessary based on the relationship between the parties.

Unfortunately, this suggestion was foreclosed by the decision in *Konzani*.⁴⁴ That judgment insisted on conscious and willing consent to the specific risk of infection with HIV made after disclosure by the defendant. Consequently, the indication is that consent will not be presumed where the relationship is of a casual nature. This is regrettable. Where the parties are engaged in a high-risk sexual exchange, courts should be more alert to the risks that the parties are taking, and relax their strict application of consent.

4. Concluding thoughts

Despite the courts' consideration of other factors, strict consent is the only currently recognised defence to the criminal transmission of HIV. To avail himself of the defence, the

³⁷ *ibid* 47.

³⁸ *ibid* 49 (Judge LJ).

³⁹ Weait (n 31) 132.

⁴⁰ Munro (n 17) 120.

⁴¹ *ibid*.

⁴² *ibid* 120-121.

⁴³ *Dica* (n 6) 39.

⁴⁴ *Konzani* (n 7) 41-42. Munro argues that there could still be a lingering relevance to the nature of the relationships involved. In particular, she argues that it may have been influential on the court's reasoning in *Konzani* that the intercourse in question took place in the context of more than casual relationships and with women who might be thought to be more trusting of the defendant within those relationships (a 15 year old virgin, a woman the defendant met at bible class and a woman with a very ill son). See Munro (n 17) 121.

defendant must have disclosed his status and received in response an informed consent to the risk of infection with HIV. This translates as an almost absolute duty to forewarn.

Many would agree with this approach. Erin and Harris, staunch supporters of bodily integrity, take the unwavering stance that one has an *absolute* duty to inform all sexual partners of one's status.⁴⁵ Their claim is based on the high regard society has for personal autonomy and for informed consent, and on the logic that disclosing one's illness to a potential sexual partner is the surest means of allowing that partner to enter the relationship after having made an informed, autonomous choice as to whether to run the risk of infection. The Court of Appeal made this same argument in *Konzani*:

If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant.⁴⁶

Though these are understandable concerns, the duty to disclose is too restrictive an approach. First, by placing the onus on the defendant to inform the victim, the victim is absolved of liability for their own sexual health. This approach ignores the conscious advertence to the risk by the complainant, and thus enforces the message that people do not need to be responsible for their own sexual health because it is the responsibility of those with serious sexual diseases to disclose their status. Insofar as meeting public health aims and maintenance of bodily integrity are concerned, it seems a far greater priority to insist on some notion of shared responsibility. Second, the duty to forewarn places a burden on the infected party. It ignores the stigma attached to those carrying the virus and assumes that it would be easy to forewarn a partner – potentially a loved one – who would end the relationship as a result.⁴⁷ Though it is morally preferable for an HIV sufferer to make a full disclosure, the law should reflect the difficulty inherent in disclosing one's status, and thus should not insist on absolute disclosure or total abstinence. By adopting such a harsh stance, the law is reinforcing the stigma attached to the disease and adding to the burden of its sufferers.

⁴⁵ See generally Charles A Erin and John Harris, 'Is There an Ethics of Heterosexual AIDS?' in L Sherr (ed), *AIDS and the Heterosexual Population* (Harwood 1993); Charles A Erin and John Harris, 'AIDS: Ethics, Justice and Social Policy' (1993) 10 *Journal of Applied Philosophy* 165, 165-173.

⁴⁶ *Konzani* (n 7) 42 (Judge LJ).

⁴⁷ 'HIV & AIDS Stigma and Discrimination' (*Avert*, 2 December 2014) <<http://www.avert.org/hiv-aids-stigma-and-discrimination.htm>> accessed 28 January 2015.

With these considerations in mind, a rethink is in order. Where a victim has either knowledge of the risk from a source other than the defendant, or where the relationship is a ‘casual or commercial’ one,⁴⁸ the law should recognise that there has been consent to the risk of HIV transmission. The authors recognise however, that even a broader reading of consent would not adequately protect defendants in all cases. For this reason, a defence of reasonable precautions ought to be examined.

C. A DEFENCE OF REASONABLE PRECAUTIONS

The previous sections have shown that the strictly applied defence of consent is too restrictive and fails to take into account factors like the victim’s knowledge of the defendant’s condition and the relationship between the partners. In addition to relaxing the definition of consent, two other measures could be taken. First, the defendant’s use of reasonable precautions could be treated as negating his recklessness (an essential element of the charge). Second, the use of reasonable precautions could be treated as a complete defence to the defendant’s liability. ‘Reasonable precautions’ means that the defendant endeavoured to minimise the risk of transmission through the use of condoms or having a low viral load. As these measures can reduce the risk significantly, there would no longer be a need for disclosure.

Some commentators have proposed that another reasonable precaution be recognised: the type of sexual activity.⁴⁹ According to these scholars, certain types of sexual activity are lower risk, and a defendant’s conscious effort to engage only in those activities should be recognised as the equivalent of condom use or a low viral load. Although the likelihood of transmission may be diminished, choosing to engage only in certain sexual activities does not provide the same benefits to the victim as condom use. Condoms are widely available and, short of abstaining, are the best known means of preventing infection. Moreover, part of the allure of a reasonable precautions defence is that it encourages individuals with HIV to use condoms consistently and others to insist on the use of these. This has obvious public health benefits that the sexual activity argument does not.

Similar arguments could be made regarding antiretroviral therapy and the subsequent lowering of a defendant’s viral load. In cases where a defendant is seeking to rely on his low viral load, the risk may be close to zero, whereas in cases of low-risk sexual activity the risk

⁴⁸ Spencer (n 33).

⁴⁹ See as an example Hughes (n 3) 141-143; cf Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 176.

will rarely be anywhere close to that.⁵⁰ Furthermore, those claiming a low viral load as a reasonable precaution would be doing so in reliance on medical evidence as to the reduced risk of transmission. The close connection between doctor and patient that this would necessitate, and the adherence to an antiretroviral regime, would also further public health goals.

For all of these reasons, type of sexual activity as a reasonable precaution will not be discussed. Instead, the authors will outline the current legal effect of the reasonable precautions of condom use and low viral load in the UK, and will then explore them as a way to negate recklessness, and as a defence. Understandably, many of the reasons that support a negation of recklessness will also support a defence, and vice versa. Therefore, the discussion of the defence will focus more on why a defence is preferable to a negation of recklessness, and what that statutory defence could look like.

1. The legal position in the UK

Thus far, there has been no confirmation from the courts on whether the proper use of precautionary measures will preclude a conviction, but there have been obiter comments that indicate the courts' willingness to consider the use of those measures. In *Dica*, Judge LJ noted that 'If protective measures had been taken by the appellant that would have provided material relevant to the jury's decision whether in all the circumstances recklessness was proved'.⁵¹ If Judge LJ was saying that a defendant who used precautions would not be reckless (and therefore criminally liable), this would strongly support the idea of reasonable precautions as a defence. However, it is more likely that the judge meant that this would be one of a number of factors the jury could take into account when determining the defendant's recklessness.⁵²

Konzani adds little clarification. In that case, no distinction was made between protected and unprotected intercourse. In fact, the Court avoided any discussion of the effect of prophylactic measures on a defendant's liability. This leaves sufferers uncertain as to when they might incur liability, and also leaves open the possibility that liability would attach to responsible sufferers who conscientiously use prophylactics to reduce their partner's risk of

⁵⁰ An undetectable viral load (for at least six months), combined with the absence of another sexually communicable infection will mean that the disease cannot be transmitted, providing the individual complies with his antiretroviral treatment. Pietro Vernazza and others, 'HIV-positive Individuals Not Suffering from Any Other STD and Adhering to an Effective Antiretroviral Treatment Do Not Transmit HIV Sexually' (2008) 89 *Bulletin des Médecins Suisses* 165.

⁵¹ *Dica* (n 6) 11.

⁵² Samantha Ryan, 'Risk-taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability' (2007) 28 *Liverpool Law Review* 215, 234.

infection. As Ryan notes, there is a danger that prosecutors may treat condom use as evidence that a defendant realised there was a risk of transmission, or a risk of infection despite the use of prophylactics.⁵³ In this manner, precautionary measures could be used to establish a defendant's liability, rather than to negate it.⁵⁴ Ultimately, it is doubtful whether such arguments would be accepted. By its very nature, the act of safe sex challenges a finding of criminal recklessness.

The Crown Prosecution Service (CPS) acknowledged that condom use might bar prosecution, as evidence that the defendant took precautions would make it difficult to establish recklessness.⁵⁵ As to a low viral load, the CPS recognised that this might be as effective as condom use in lowering the risk of transmission.⁵⁶ It would be easy to take this recognition as evidence that the CPS would treat reliance on a low viral load the same way it treats the use of prophylactics, but they have not taken that step. The CPS acknowledged that medical opinion is still divided on this issue, and so has refrained from making any suggestions.⁵⁷ The issue of viral load has not been addressed by the courts, thus it is impossible to predict what they might do if faced with a case that raised a low viral load as a defence. In its scoping paper, the Law Commission noted that a low viral load may reduce the risk of transmission, but ultimately gave no indication of what stance it would take.⁵⁸

2. Negation of recklessness

a) A justifiable risk

Recklessness is the minimum mens rea required to impose liability for the criminal transmission of HIV.⁵⁹ To prove recklessness, the prosecutor must show that the defendant took an unjustified risk.⁶⁰ Therefore, recklessness will be negated if the risk taken is considered justifiable. According to Ryan, the factors used to determine whether a risk is justifiable include: the likelihood of the risk occurring, what precautions could be taken, the social utility of the conduct involved, and the seriousness of the risk.⁶¹ A consideration of these factors will show that the use of reasonable precautions should support a negation of recklessness.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Crown Prosecution Service (CPS) 'Intentional or Reckless Sexual Transmission of Infection' <http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe> accessed 29 January 2015.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Law Commission (n 4) 6.25-6.30, 6.89-6.99.

⁵⁹ Offences Against the Person Act (n 1). See also CPS (n 57) for prosecuting guidance.

⁶⁰ Regarded by lawyers as a risk it is unreasonable to take: *R v Stephenson* [1979] QB 695 (CA), 703.

⁶¹ Ryan (n 52) 223.

The first factors to be considered are the likelihood of the risk occurring, and what precautions can be taken to guard against that risk. Some contended that criminal liability should be reserved for conduct that carries ‘a high or significant risk’ of transmission.⁶² All sexual activity, with any partner, carries some risk: accordingly, the law should only be concerned with ‘high-risk activity’. Though unprotected sex with an HIV sufferer is risky,⁶³ the use of precautions can significantly reduce the likelihood of that risk being realised. Sex with a condom lowers the risk of transmission from vaginal intercourse to as low as 1 in 10,000 for a woman,⁶⁴ and 1 in 20,000 for a man.⁶⁵ Oral sex with a barrier presents an even lower risk of transmission.⁶⁶ This medical evidence strongly indicates that, where precautions are taken, the risk of contracting HIV ought to be deemed too low for liability to attach.

As for a defendant’s viral load, this is the greatest risk factor for HIV transmission.⁶⁷ The higher a person’s viral load, the higher the chance they will pass on the infection. This makes it a definite risk factor. However, precautions can be taken. A sufferer’s viral load can be lowered by taking antiretroviral medications, and the consistent use of these treatments can lower a person’s viral load to a level where it will no longer be detectable.⁶⁸ In fact, the Swiss Federal Commission for HIV/AIDS found that, where a person fully complies with his antiretroviral regime and does not have any other sexually communicable diseases, after six months there will be no risk of transmission through sexual intercourse.⁶⁹ Much like condom use, then, the likelihood of the risk occurring should be too low for liability to attach.

The next consideration is that of social utility. This factor is often heavily relied on by the courts when determining whether a risk can be termed justifiable. Inevitably, risk taking is more likely to be regarded as justifiable if there is high social value attached to the relevant activity. There is little doubt that sexual intimacy has a high social value. As Hart observed,

⁶² For authors who have discussed a ‘high or significant risk’ or equivalent: C Strickland, ‘Why Parliament Should Create HIV Specific Legislation’ (2001) 2 Web Journal of Current Legal Issues 5; Richard Elliott, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (Joint United Nations Programme on HIV/AIDS, 2002), 9; See more recently Ryan (n 52) 230.

⁶³ P Fisher and others, ‘UK Guideline for the Use of Post-exposure Prophylaxis for HIV Following Sexual Exposure’ (2011) 22 International Journal of STD & AIDS 695, 697.

⁶⁴ Steven D Pinkerton and Paul R Abramson, ‘Effectiveness of Condoms in Preventing HIV Transmission’ (1997) 44 Social Science and Medicine 1303, 1310.

⁶⁵ Carol L Galletly and Steven D Pinkerton, ‘Toward Rational HIV Exposure Laws’ (2004) 32 Journal of Law, Medicine and Ethics 327, 328.

⁶⁶ The risk of contracting HIV is even lower when a female sufferer has sex with a man; Hortensia Amaro, ‘Love, Sex and Power: Considering Women’s Realities in HIV Prevention’ (1995) 50 American Psychologist 437, 438.

⁶⁷ World Health Organisation, ‘Programmatic Update: Antiretroviral Treatment as Prevention (TASP) of HIV and TB’ (WHO Press 2012) 6.

⁶⁸ *ibid* 7.

⁶⁹ Vernazza and others (n 50) 165.

sexual impulses form a strong part of each person's daily life, and their suppression can seriously affect 'the development or balance of the individual's emotional life, happiness and personality'.⁷⁰ The high regard for sexual intimacy should, therefore, be a dominant factor in any assessment of a defendant's recklessness, especially when any denial of a sufferer's right to engage in protected intercourse would arguably amount to an unjustifiable intrusion into an eminently private matter.⁷¹ Bennett, Draper and Frith emphasise the importance of this factor:

At some point in the widespread debate about HIV transmission, we must explore the relative worth which is to be attached to sexual expression and sexual gratification ... If sexual expression and gratification are extremely valuable, then some known or unknown risk-taking may be justified with reference to the good such sex bestows on the individuals concerned.⁷²

The above factors should feature prominently in the court's calculation of the justifiability of the risk taken, and they all suggest that the defendant's recklessness may well be negated by his use of precautions. However, there is another factor to consider: the seriousness of the risk. HIV is an incurable disease that may eventually result in AIDS, and even death. This cannot be ignored and, more often than not, this consideration sways those who consider this dilemma. Reality, however, is very much at odds with the hysteria surrounding the disease. HIV is not the death sentence it was thirty years ago. There have been profound advancements in medicine since HIV was discovered, and treatment options have evolved. Indeed, research reveals that those who react well to antiretroviral therapy now have the same mortality rates as those in the general population.⁷³ This shows that the seriousness of the risk of infection with HIV has been overestimated, and this has profound effects on defendants in criminal transmission cases. As Ryan observes, if HIV continues to be treated as a death sentence, then it will be impossible to argue that running the risk of transmission is ever justified.⁷⁴

b) Legal precedent

In this case of public health versus individual freedoms, it is uncertain exactly which way the courts would lean if the issue ever reached them. However, there is legal precedent, albeit from another jurisdiction, that the careful use of condoms may lower the risk below the

⁷⁰ HLA Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 22.

⁷¹ Ryan (n 52) 228.

⁷² Rebecca Bennett, Heather Draper and Lucy Frith, 'Ignorance is Bliss: HIV and Moral Duties and Legal Duties to Forewarn' (2000) 26 *Journal of Medical Ethics* 9, 14.

⁷³ Yusef Azad, Lisa Power and Matthew Weait, 'Assault and Other Offences Against the Person: Response to the Consultation Guidelines' (National AIDS Trust and Terrence Higgins Trust, 29 October 2007) 2.

⁷⁴ Ryan (n 52) 227.

threshold for criminal responsibility. In *R v Cuerrier*,⁷⁵ the Supreme Court of Canada held that the failure to disclose one's HIV positive status to a sexual partner could constitute fraud, which would vitiate consent to sexual activity if there was 'a significant risk of serious bodily harm' to the victim.⁷⁶ Despite this, Justice Cory found that the proper use of condoms could reduce the level of the risk taken, such that it would no longer be deemed significant. Speaking for the majority, he stated that:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. *Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant...*⁷⁷

The effect of these comments was mixed. Some courts endorsed them wholeheartedly,⁷⁸ whereas others were indifferent to them, and paid no attention to the accused's use of precautions.⁷⁹ As a result, the legal effect of condom use in Canada was uncertain for several years.

Around the same time, the Canadian courts were dealing with the legal effect of a low viral load. In *R v DC*,⁸⁰ the court found that a defendant with an undetectable viral load was not required to disclose their status to a partner because the level of risk of harm was not significant enough.⁸¹ Though that decision was limited to those with undetectable levels, other cases suggested that a significant risk of harm could not be proved with a low viral load either.⁸² It seemed that Canadian courts were indicating that viral loads, on their own, would be important to any assessment of risk.

*R v Mabior*⁸³ resolved any uncertainties around the legal effect of condom use or viral loads. It stated that the risk of harm could be reduced by the defendant's proper use of condoms, but only where the accused's viral load was also very low or undetectable.⁸⁴ Therefore, under the Canadian approach a defendant must now use a condom *and* have a low viral load. This is despite the fact that the statistical probability of transmission where there is a low viral load or the use of protective measures reveals that the two can operate in isolation. However, these cases still show that a precedent for recognising the use of precautions as

⁷⁵ [1998] 2 SCR 371 (SC).

⁷⁶ *ibid* 128-129.

⁷⁷ *ibid* 129 (emphasis added).

⁷⁸ *R v Agnatuk-Mercier* [2001] OJ No 4729 (QL), in which both counsel agreed that the Crown had to prove the alleged intercourse was unprotected; *R v Smith* [2007] SJ No 116 (QL) (SKQB) 59.

⁷⁹ *R v Mekonnen* [2009] OJ No 5766 (QL); *R v Parenteau* 2010 ONSC 1500 6.

⁸⁰ 2010 QCCA 2289.

⁸¹ *ibid*.

⁸² *R v JU* [2011] ONCJ 457.

⁸³ 2012 SCC 47 (SC).

⁸⁴ *ibid* 101.

lowering the level of risk exists, and show how statistics on transmission may eventually sway the courts in the UK.

Ultimately, any discussion of whether the courts would recognise reasonable precautions as negating mens rea is purely speculative. Though the authors feel that the factors affecting the justifiability of risk are more than met, it cannot be denied that the courts may feel differently. They may continue to promote public health by punishing the sexual activity of HIV sufferers, or they may choose to reward the efforts of those sufferers, and acknowledge the difficulties that they face.

3. A Statutory defence

The authors have argued that the best way forward is the creation of a defence of reasonable precautions. This is true for a number of reasons, particularly because of the clear lines that it will provide to defendants and to the courts, and because of the public health benefits it will inspire. Recognising reasonable precautions as a defence, as opposed to as a negation of recklessness, would more clearly convey to sufferers the scope of their legal duty to others. With suitable education, sufferers would know that taking reasonable precautions would afford them a defence to a charge of recklessly transmitting the virus. If the development of precautionary measures as negating recklessness were left to the courts, not only would it take a long time to develop, but it would likely be an uncertain development. This piecemeal approach is visible in the case development in Canada. In the period leading up to *Mabior*, uncertainty over the legal effect of reasonable precautions prevailed. This uncertainty should be avoided, as recognising reasonable precautions is meant to leave sufferers in no doubt as to their legal obligations to others.

Similarly, the creation of a defence would remove any of the courts' uncertainties. A recognised defence would negate the need for the courts to consider conflicting statistics on the exact level of risk where condoms have been used, and whether this lowers the risk enough to negate a finding of recklessness. With a recognised defence, the decision would already have been made by the legislature. Canadian jurisprudence highlights this difficulty. As regards viral loads, the courts first indicated that an undetectable viral load would eliminate the need for full disclosure by the defendant. The courts later indicated that a merely low viral load would be sufficient. In *Mabior*, the Supreme Court seemed to turn its back on these rulings, stating that a defendant would have to use a condom *and* have a low or undetectable viral load.⁸⁵

⁸⁵ *ibid* 101.

The clarity that a statutory defence would provide would also assure sufferers of the legal benefits of careful condom use. This should encourage greater condom use amongst sufferers, which would in turn further public health aims. Aside from total abstinence, the use of condoms is the best way to prevent the spread of HIV and other sexually transmissible diseases.⁸⁶ On this note, the practicalities of adopting such a stance ought to be explored.

What would this statute look like? In the main, it would merely need to stipulate that careful condom use or a low viral load could be used as a defence; the burden would be an evidential one. It should also state that the defendant must take the (reduced) risk with awareness; that is, he must be aware of the effect of his taking precautions. Regarding viral load, the statute should specifically require that the defendant be able to establish a low viral load, by medical evidence, throughout the period of time during which he was engaging in intercourse with his partner. A defence enshrined in statute may, after medical advancements, become full of omissions or caveats. For this reason, a mechanism should be included in the legislation that allows it to be updated in an effective and timely manner. One way to accomplish this would be to allow the Secretary of State to enact new legislation as new circumstances arise.⁸⁷ For example, the law may someday want to recognise the type of sexual activity as a reasonable precaution that merits a defence, or there could be further advancements in antiretroviral therapies.

In terms of whether the defence would operate as an excuse or as a justification, the authors contend that no justification should be found. It is clear that a defendant's actions cannot be called justified when he has deliberately concealed his status as an HIV sufferer from his sexual partner. Fletcher captures the distinction nicely:

[C]laims of justification concede that the definition of the offence is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks as to rightness of an act; an excuse as to whether the actor is accountable for a concededly wrongful act.⁸⁸

Justification therefore provides a much stronger form of exculpation. In Hart's words, a justification is given to conduct that 'the law does not condemn or even welcomes'.⁸⁹ Given this, it is clear that the use of precautions could only ever excuse the defendant's actions; the

⁸⁶ UNAIDS, UNFPA and WHO 'Condoms and HIV Prevention: Position Statement by UNAIDS, UNFPA and WHO' (*UNAIDS*, 19 March 2009) <<http://www.unaids.org/en/resources/presscentre/featurestories/2009/march/20090319preventionposition>> accessed 29 January 2015.

⁸⁷ Hughes (n 3) 149.

⁸⁸ George P Fletcher, *Rethinking Criminal Law* (Little Brown 1978) 759.

⁸⁹ HLA Hart, *Punishment and Responsibility* (OUP 1968) 13.

state is never going to ‘welcome’ non-disclosure, even where precautions have been taken. The state may, however, be prepared to concede the wrong in non-disclosure, but nevertheless seek to avoid the attribution of blame on the basis of the defendant’s use of protection. Further support for reasonable precautions as an excuse comes from the deeds theory of justifiable defences,⁹⁰ under which a person does not need to be aware of the circumstances justifying his conduct for a justification, but for an excuse, needs to be aware of the availability of the defence.⁹¹

Quite obviously, if a defendant is to rely on reasonable precautions as a defence, he should be consciously taking those steps to fulfil his legal and moral obligations to his partner. Indeed, in line with the reasoning from *R v Dadson*,⁹² it would need to be insisted upon that reasonable precautions would not be an excuse, unless the defendant intentionally took those measures to protect his partner, and himself, at the time of the offence. Thus, the best option is for the law to recognise a ‘safer sex defence’⁹³ that would excuse HIV sufferers who engage in protected intercourse so long as the precautions taken are medically reasonable in light of the nature of the infection. In view of these proposals, the duty upon HIV sufferers to disclose their status would inevitably undergo change.

4. A duty to disclose?

What would become of the duty to disclose one’s status if reasonable precautions negated recklessness or operated as a defence? It has been inferred that the need for disclosure would be negated by the defendant’s taking precautions. Some extended discussion of this question is required, since it is at least arguable that whenever a risk, even a small risk, remains when reasonable precautions are used, the infected party ought still to have informed his sexual partner of his status.⁹⁴ Support for this stance is easy to find. There is a wealth of opinion questioning the morality of a stance that would allow infected parties to decide, on behalf of their sexual partner, the level of risk they are ultimately willing to accept. Ciccarone and others argue strongly that such an approach would be “ethically indefensible”.⁹⁵ Bruner argues even more strongly still that:

... powerful arguments can be made that withholding information about one’s HIV infection from a sex partner is morally disrespectful and treats the other as a means to

⁹⁰ See Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press 1997) 101.

⁹¹ JC Smith, *Justification and Excuse in the Criminal Law* (Stevens, 1989) 28; See also Hughes (n 3) 137.

⁹² (1850) 14 JP 754.

⁹³ Ryan (n 52) 233.

⁹⁴ Ryan (n 52) 235-236.

⁹⁵ DH Ciccarone and others, ‘Sex Without Disclosure of HIV Serostatus in a US Probability Sample of Persons Receiving Medical Care for HIV Infection’ (2003) 93 *American Journal of Public Health* 949, 953.

one's own end ... rather than as a moral agent – a human being – who is entitled to make his or her own decisions about sexual risk.⁹⁶

Of course, the ideal is that all HIV sufferers would disclose their status to their sexual partners, and would feel comfortable doing so. But this is an ideal. Social preconceptions do not lend themselves to HIV sufferers being open and frank about their condition with others. As Judge LJ notes in *Dica*, 'there are significant negative consequences of disclosure of HIV'.⁹⁷ Even cursory research into this reveals that non-disclosure is motivated by many varying practical and emotional reasons, including the fear of prejudicial reactions; the possible admission of sexual infidelity, rape, or intravenous drug use; the potential breach of privacy if a sufferer's status becomes fodder for gossip; and realistic fears of rejection or humiliation.⁹⁸

There is also the more serious fear that disclosure could turn violent if it results in a physical altercation. Given the potential gravity of these outcomes, it is clear that a decision as to the need for disclosure cannot be made in a vacuum. There needs to be a balancing of the difficulty of disclosure against the necessity for this where the risk has been substantially lowered by the defendant's use of precautions. It seems that Grant has the right approach when she says that the criminal law should be reserved for the most egregious cases of non-disclosure in the context of unprotected sex.⁹⁹ Disclosure is inherently difficult and those taking reasonable precautions are making efforts to avoid transmission of the virus.

The argument for disclosure despite precautions becomes even weaker when one considers the statistical probability of transmission when such measures are taken. For example, the Canadian AIDS Society considers unprotected anal and vaginal intercourse to be 'high risk behaviours' in terms of the likelihood of transmission, whereas it considers protected intercourse to be only 'low risk'.¹⁰⁰ Furthermore, the risk of transmission of HIV between heterosexual couples is reduced by up to 96% where the infected party is taking antiretroviral drugs.

⁹⁶ D Bruner, 'High-risk sexual behavior and failure to disclose HIV infection to sex partners: how do we respond?' (2004) 19 *Aids and Public Policy Journal* 11 at 20.

⁹⁷ *Dica* (n 6) 54.

⁹⁸ See generally Stein and others 'Sexual Ethics: Disclosure of HIV-positive Status to Partners' (1998) 158 *Archives of Internal Medicine* 253; Jenny A Petrak and others, 'Factors Associated with Self-Disclosure of HIV Serostatus to Significant Others' (2001) 6 *British Journal of Health Psychology* 69; Kathryn Greene and others, *Privacy and Disclosure of HIV in Interpersonal Relationships: A Sourcebook for Researchers and Practitioners* (Lawrence Erlbaum Associates 2003) 45-63; Ryan (n 52).

⁹⁹ Isabel Grant, 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (2009) 54 *McGill Law Journal* 389, 400.

¹⁰⁰ Canadian AIDS Society, *HIV Transmission: Guidelines for Assessing Risk* (5th edn, Canadian AIDS Society 2004) 24-25.

In view of the low risk of infection where precautions are utilised, Bennett, Draper and Frith's argument that 'when the risk is low it is possible to act in a responsible and morally justifiable way without forewarning' seems more plausible.¹⁰¹ They go on to argue that in a liberal society, the level of risk must surely be allowed to influence the obligation to forewarn others.¹⁰² This is directed specifically at comments made by Erin and Harris, who advocate for an absolute duty to forewarn, largely on the basis of the (faulty) logic that all sexual relations with an infected party involve an absolute risk because HIV will eventually result in premature death.¹⁰³ Such an argument ignores science,¹⁰⁴ and ignores the actual behaviour of HIV sufferers. One study reveals that non-disclosure is often a considered choice where the risk is low, made where the sufferer is satisfied that as a result of that low risk, they are either not putting anyone at risk or are exposing them to a negligible risk only.¹⁰⁵

Two issues remain before the issue of disclosure can be laid to rest. The first is the failure rate of condoms. Condoms have been reported as having a 20% failure rate, in light of the fact that they can fall off, break, or be used improperly.¹⁰⁶ The question then becomes which party should bear the risk of the condom failing.¹⁰⁷ One approach is to insist on disclosure so that the person at greatest risk can decide exactly what risks they are prepared to accept.¹⁰⁸ The other is to accept the failure rate of condoms and to continue insisting on their use on the basis that, barring abstinence, condom use is the best known way to prevent HIV transmission.¹⁰⁹ The authors favour the latter approach, given that the taking of precautions should, in principle, be easier than disclosure, and that this contributes towards the overall aim of preventing the spread of HIV.¹¹⁰ This strikes the appropriate balance that Ryan speaks of between the need to protect a sexual partner from exposure and the need to protect the person infected from the potentially negative consequences of disclosure.¹¹¹

The second issue is whether allowing a defendant's recklessness to be negated or excused will lead to greater recklessness in society as a whole. Wilson and others argue that 'the risk of HIV transmission in heterosexual partnerships in the presence of effective

¹⁰¹ Bennett, Draper and Frith (n 72) 12.

¹⁰² *ibid* 11-12.

¹⁰³ Erin and Harris, 'Is There an Ethics of Heterosexual AIDS?' (n 45); Bennett, Draper and Frith (n 72) 11.

¹⁰⁴ Azad, Power and Wait (n 73) 2.

¹⁰⁵ Stein and others (n 98) 256.

¹⁰⁶ See the expert evidence presented in *Mabior* (n 83) 98.

¹⁰⁷ Grant (n 99) 398.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid*.

¹¹⁰ Ryan (n 52) 239.

¹¹¹ *ibid*.

treatment is low but non-zero and ... if the claim of non-infectiousness in effectively treated patients was widely accepted, and condom use subsequently declined, then there is the potential for substantial increases in HIV incidence'.¹¹² Unfortunately, some sufferers with a low viral load will probably be of the opinion that they no longer need to utilise condoms if a low load is enough to avoid criminal liability.¹¹³ However, the level of risk presented by such a person will be low enough that an increase in transmissions will be unlikely. Furthermore, even though those with low viral loads may not feel that they need to use condoms to protect others because of the low risk, they would likely do so in order to protect themselves from other STIs that could, in turn, cause their viral load to change.

It is true that a risk will always be present when a person engages in sexual activities with an HIV sufferer. But there is always a risk to sex – if not of contracting HIV, then of contracting another disease, or of becoming pregnant.¹¹⁴ When a person with HIV takes reasonable precautions, the law should recognise that the sufferer has taken action to prevent the spread of the virus, and not punish them. An approach which places a higher degree of emphasis upon education and personal responsibility for one's own body may prove more effective in improving the wellbeing of both the sufferer and the uninfected party than one which focuses on penalisation.

D. CONCLUSION

There is no doubt that the transmission of HIV is a serious issue, and that it should be handled in a fair and sensitive manner. The authors suggest that the most appropriate way to achieve this aim is the implementation of a model that places an equal level of responsibility on both the infected and the uninfected parties. Currently, a disproportionate duty is placed on the infected party to forewarn any potential sexual partners of their HIV status. The authors submit that there is a significant difference between sexual encounters with near-strangers and sexual encounters that occur within committed, monogamous relationships. The reduction of the duty to forewarn where no significant relationship exists could prove effective in increasing awareness of the virus and may, in turn, encourage people to take a higher degree of responsibility for their bodies.

¹¹² David P Wilson and others, 'Relation Between HIV Viral Load and Infectiousness: A Model-based Analysis' (2008) 372 *The Lancet* 314, 314.

¹¹³ Grant (n 99) 402. She points out that some defendants may even decide to make their own 'risk assessments' about their viral load, which is why the authors believe that a defendant must be able to establish their viral load with medical evidence.

¹¹⁴ NHS, 'Sex Activities and Risk' (2013) <<http://www.nhs.uk/livewell/stis/pages/sexualactivitiesandrisk.aspx>> accessed 30 January 2015.

It is, however, recognised that a simple reduction of the sufferer's duty to disclose may not, in itself, prove effective enough in reducing the criminal liability of the HIV sufferer. It is suggested that the defence of reasonable precautions outlined within this article would likely allow for a wider margin of flexibility where the disclosure of HIV is concerned. Providing that a defendant has taken reasonable precautions to prevent the spread of the virus, they arguably ought to be entitled to an excuse in the rare circumstances where the virus spreads in spite of preventative measures that have been taken. An approach of this nature would provide clear guidelines for HIV sufferers, reducing the inequitable risk of criminalisation based on infection alone. Above all, it is submitted by the authors that the proposals outlined in this piece would be highly effective in reducing the stigma of HIV and in changing social attitudes for the better regarding transmission of the virus.